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10/552,655	10/11/2005	Felix Flachsmann	102790-128 (30044 US)	2738
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PARFOMAK, ANDREW N. NORRIS MCLAUGHLIN & MARCUS PA 875 THIRD AVE, 8TH FLOOR NEW YORK, NY 10022			GRESO, AARON J	
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/552,655	<b>Applicant(s)</b> FLACHSMANN ET AL.	
	<b>Examiner</b> AARON GRESO	<b>Art Unit</b> 1763	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 09 September 2010.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 3,5,8,10,11,13,15,18 and 19 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 3,5,8,10,11,13,15,18 and 19 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |   |   |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                    | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)         | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____   | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

### **Continued Examination Under 37 CFR 1.114**

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 09 September 2010 has been entered.

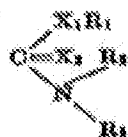
Any rejections and/or objections made in the previous Office Action and not repeated below, are hereby withdrawn.

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

### **Claim Rejections - 35 USC § 102/103**

Claim 3 is rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Karr Hunt et al. (US 2060733).

Karr Hunt et al. (col 2-3 lines 33-50 and 1-6 respectively) disclose carbamate materials added to compositions; the genus is presented in Figure 1 below:



where  $X_1$  and  $X_2$  are oxygen or sulfur,  $R_1$  is a monovalent hydrocarbon radical, and  $R_2$  and  $R_3$  are hydrogen or monovalent organic (especially hydrocarbon) radicals.  $R_1$ ,  $R_2$ , and  $R_3$ , for example, may be such general types of hydrocarbon radicals as alkyl, alkenyl, aryl, aralkyl, cycloalkyl, etc., or such particular hydrocarbon radicals as methyl, ethyl, propyl, 1-butyl, amyl, decyl, dodecyl, octadecyl, phenyl, tolyl, xylyl, naphthyl, benzyl, cinnamyl, 9,10-octadecenyl, cyclohexyl, naphthhenyl, etc.

Figure 1. Genus of Karr Hunt et al. X is Oxygen or Sulfur.

The genus indicates a trend of  $R_1$ ,  $R_2$ , and  $R_3$ , materials comprising linear or branched alkanes from C1 to C18, phenyl, tolyl, or benzyl; X is Oxygen or sulfur.

As the fragrance ingredient is met, the reference discloses or inherently discloses all the property limitations of the applicable Claim when X is Oxygen.

In the alternative:

As the reference discloses a method for adding carbamate material to a composition and as the reference's materials are members within the Claim 3 genus it would be expected that the inherent fragrant properties of the materials provide for the property limitations indicated for Claims 3.

Further, the reference teaches a genus which places a claimed species in the possession of the public as in *In re Schaumann*, 572 F2d 312, 197 USPQ 5 (CCPA 1978), and [the] species would have been obvious even if the genus were not sufficiently small to justify a rejection under 35 USC 102. See MPEP § § 2131.02 and 2144.08 for more information on anticipation and obviousness of species by a disclosure of a genus.

**Claim Rejections - 35 USC § 103**

Claim 5 is rejected under 35 U.S.C. 103(a) as being obvious over Karr Hunt et al. (US 2060733).

Karr Hunt et al. (col 2-3 lines 33-50) disclose carbamate materials added to compositions; the genus is presented in Figure 1 above.

The genus indicates a trend of R1, R2, and R3, materials comprising linear or branched alkanes from C1 to C18, phenyl, tolyl, or benzyl; X is oxygen or sulfur.

The reference does not specifically disclose the claimed materials of instant Claim 5.

On the other hand, the genus indicates a trend of R1, R2, and R3, materials comprising linear or branched alkanes or alkenes from C1 to C18, including methyl ethyl, propyl, butyl, amyl {pentyl}, decyl, dodecyl, cyclohexyl, phenyl, tolyl, or benzyl; including N-methyl-N-phenyl ethyl carbamate (col 3 line 26) {taken as a demonstration allowing mixed variations of R1, R2, and R3 groups}; while X is indicated by the genus to comprise oxygen or only one other moiety.

Further, as the reference teaches a trend of linear materials starting from methyl, ethyl, propyl, decyl, dodecyl, octadecyl, the trend is taken to include linear R1-3 groups that would include C1 to C18 materials, this would also include C6, linear, or linear hexyl groups.

This would include the composition of Applicants' instant Claim 5 material that is identified as the chemical species; corresponding to the 14<sup>th</sup> entry from the top of Applicants' instant Claim 5; comprising ethyl, methyl, and hexyl R, R1 and R2 groups.

As the genus limits the moieties for X, R1, R2, and R3, the number of possible materials is finite. As the list is finite, and the readily identified materials comprising methyl, ethyl and hexyl groups, it would be obvious to one of ordinary skill in the art to choose any of the successful materials comprised by the limiting and successful genus boundaries as a successful chemical material with a reasonable expectation of success. See MPEP § § 2131.02 and 2144.08 for more information on obviousness of species by a disclosure of a genus for the applications indicated by the reference.

The material would be expected to have inherent properties, including those identified by the Applicants. It is held that "Products of identical chemical composition can not have mutually exclusive properties." A chemical composition and its properties are inseparable. Therefore, if the prior art teaches the identical chemical structure, the properties applicant discloses and/or claims are necessarily present. *In re Spada*, 911 F.2d 705, 709, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990).

It would have been obvious to one of ordinary skill in the art at the time of the invention to have chosen for adding to compositions, a chemical species, with inherent properties, within the genus and genus boundaries taught by Karr Hunt et al.; to obtain a carbamate with inherent properties with a reasonable expectation of success.

Claims 3, 5, 8, 10-11, 13, 15, 18-19 are rejected under 35 U.S.C. 103(a) as being obvious over Finch et al. (US Ap 2001/0036907) in view of Karr Hunt et al. (US 2060733).

Finch et al. (page 1 paragraph [0001]-[0011], [0016]-[0017]; page 1-2 paragraph [0018], page 2 paragraph [0019]-[0020], [0025], Abstract, page 5 paragraph [0073]-[0076]) employs esterfied cellulose, rebuild material that improves fragrance retention on fabrics that are laundered; the materials are indicated to be preferred as functioning as fragrancng material for as long as possible.

The material is indicated to be placed into compositions (page 6 paragraphs [0080]-[0085]) and is indicated to be applicable to a wide range of fragrance materials (page 5 paragraph [0076]).

The reference does not further teach the employment of carbamate materials within the Claim 3, 5, 10, and for those of the Applicants' instant Claim 11 genus of materials comprised in the fragrancng compositions.

On the other hand, Karr Hunt et al. discloses a genus of carbamate materials {see Figure 1 above} that are indicated to prevent the deterioration of esterfied cellulose materials (col 2-3 lines 33-50 and 1-6 respectively). The carbamates is applied to fabric material in water (pages 2-3 Examples 2-3) and are indicated to be used in a process of adding the carbamate materials to cellulose materials (page 3 claims 1-2).

The materials indicated by Karr Hunt et al. would include the composition of Applicants' instant Claim 5, and instant Claim 10 material that is identified as the

chemical species; corresponding to the 14<sup>th</sup> entry from the top of Applicants' instant Claim 5 and Claim 10; comprising ethyl, methyl, and hexyl R, R1 and R2 groups.

Further as to Claim 11:

As the material genus of Karr Hunt et al., indicate that R1-R3 comprise cyclohexyl and ethyl groups, the 1<sup>st</sup> composition with the cyclohexyl and ethyl moieties in the genus's R1, and R2, R3 respectively when X is Oxygen.

It would have been obvious to one of ordinary skill in the art at the time of the invention to have added a cellulose preserving material with inherent fragrance properties successfully employed with fabrics as taught by Karr Hunt et al., to a fragrance retention enhancing compositions employed with cellulose materials in laundry applications, as taught by Finch et al., that are also suggested by Finch et al. as being desired to provide fragrance material for as long as possible, with a reasonable expectation of success.

Claims 3 and 8 are rejected under 35 U.S.C. 103(a) as obvious over Torii et al. (US 3966903) in view of Kaiser et al. (US 4260526).

Torii et al. discloses compositions for hair waving comprising the following genus chemicals (Abstract) shown in Figure 1 below:



Figure 2. US 3966903 genus



In Figure 3,  $R_1$ ,  $R_2$ , and  $R_3$  are chosen from a group comprising, methyl, ethyl, and propyl groups. The formulations are not are not indicated to have an unpleasant odor (Abstract) when adding this material (col 3 lines 32-45).

The reference discloses a genus with an insufficient number of carbons for at least some of the combinations of methyl, ethyl or propyl groups for materials in Claims 3, 8, 11, 13.

On the other hand, when two of the R groups comprise ethyl groups and the third comprises a propyl group, or when two out of three R groups comprise propyl groups while the third group is an ethyl or a methyl, the materials identified conform to the requirements of instant Claim 3.

These genus attributes satisfy the instant Claim 3 genus and can be readily envisaged when  $R_1$ ,  $R_2$ , and  $R_3$  of the reference are each  $C_1$ - $C_{11}$  alkyl groups for the Claim 3 genus group a) for each R,  $R^1$  and  $R^2$  species comprise at least two propyl groups or at least one ethyl or methyl in combination with two propyl moieties.

Because the Applicants indicate that the materials are fragrant, it is taken that the materials are also added as fragrances or as fragrant materials without an unpleasant odor as the materials are within the genus of the Applicants. Case law holds that a material and its properties are inseparable. In re Spada, 911 F.2d 705, 709, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990).

Further as to Claim 8:

The chemicals are indicated to be combined with other materials including perfumes (col 4 lines 46-52). The compositions are indicated to be used for hair waving (col 1 lines 65-68) and this terminology is taken as indicating uses for hair, as a body care product; compositions are also indicated to be free from any unpleasant odor and this is taken to indicate that the compositions employing the genus chemicals are intended to be used because they enable a pleasant odor.

All chemicals in the genus of Figure 2 are indicated to possess no unpleasant odors (col 3 lines 32-34), while the materials are not indicated to be odorless.

In addition, the reference indicates that other chemicals employed as hair treatment materials, also indicated as having no odor, include gamma valerolactone (col 3 line 28); gamma-valerolactone, that would be expected to be known in the art by one of ordinary skill, as a fragrance (per Kaiser et al. US 4260526, Example G col 14); the valerolactone material is classified along with ethyl N,N-dimethylcarbamate {a material comprised within the Reference's genus} (col 3 lines 25-26), as also a material with no unpleasant odor.

As it is known in the art, as taught by Kaiser, that fragrance chemicals are applicable to having no unpleasant odor, the combined references are taken as indicating that the materials of Torii are applicable to fragrance properties.

Therefore, the material would be expected to have inherent properties, including those identified by the Applicants. It is held that "Products of identical chemical composition can not have mutually exclusive properties." A chemical composition and its

properties are inseparable. Therefore, if the prior art teaches the identical chemical structure, the properties applicant discloses and/or claims are necessarily present. In re Spada, 911 F.2d 705, 709, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990).

As the reference discloses a method for adding carbamate material to a composition; and as the reference's materials are members within the Claim 3 genus; it would be expected that the inherent fragrant properties of the materials provide for the property limitations indicated for Claims 3 and its dependent Claims 8.

Further, In view of the reference's recognition that a fragrance material and carbamate materials are equivalent and interchangeable, it would have been obvious to one of ordinary skill in the art to substitute a fragrance with a carbamate material with inherent odiferous properties and thereby arrive at the present invention. Case law holds that the mere substitution of an equivalent (something equal in value or meaning, as taught by analogous prior art) is not an act of invention; where equivalency is known to the prior art, the substitution of one equivalent for another is not patentable. See In re Ruff 118 USPQ 343 (CCPA 1958).

Claim 11 and 13 are rejected under 35 U.S.C. 103(a) as being obvious over Torii et al. (US 3966903).

Torii et al. discloses compositions for hair waving comprising the following genus chemicals (Abstract) shown in Figure 3 below:



**Figure 3. US 3,966,903 genus>>**

In Figure 3,  $R_1$ ,  $R_2$ , and  $R_3$  are chosen from a group comprising, methyl, ethyl, and propyl groups. These genus attributes satisfy the instant Claim 3 genus and can be readily envisaged when  $R_1$ ,  $R_2$ , and  $R_3$  of the reference are each  $C_1$ - $C_{11}$  alkyl groups for the Claim 3 genus group a) for each  $R$ ,  $R^1$  and  $R^2$  species.

The chemicals are indicated to be combined with other materials including perfumes (col 4 lines 46-52). The compositions are indicated to be used for hair waving (col 1 lines 65-68) and this terminology is taken as indicating uses for hair, as a body care product; compositions are also indicated to be free from any unpleasant odor and this is taken to indicate that the compositions employing the genus chemicals are intended to be used because they have a pleasant smell. {It should be noted that the reference does not indicate that the materials are free from odor.}

Further as to Claims 11, 13:

The reference does not further disclose employing chemicals in the Claim 11 genus.

However, Claims 11, 13 are rejected under 35 U.S.C. 103 as being obvious in accord with MPEP 2144.09 regarding Homology and Isomerism which states:

“Compounds which are position isomers (compounds having the same radicals in physically different positions on the same nucleus) or homologs (compounds differing regularly by the successive addition of the same chemical group, e.g., by  $-CH_2-$  groups) are generally of sufficiently close structural similarity that there is a presumed expectation that such compounds possess similar properties”.

When the reference's genus {discussed above} employs substituents where R<sub>1</sub> is propyl, and when R<sub>2</sub> and R<sub>3</sub> are ethyl, a homolog of a chemical in the Structure Table for Claim 11 is indicated. The Structure Table chemical being 2<sup>nd</sup> to the bottom of page 6 of 20 in instant Claim 11 where when one of the amine alkyl groups is butyl instead of propyl.

All chemicals in the genus of Figure 2 are indicated to possess no unpleasant odors (col 3 lines 32-34), while the materials are not indicated to be odorless.

The material would be expected to have inherent properties, including those identified by the Applicants. It is held that “Products of identical chemical composition can not have mutually exclusive properties.” A chemical composition and its properties are inseparable. Therefore, if the prior art teaches the identical chemical structure, the properties applicant discloses and/or claims are necessarily present. In re Spada, 911 F.2d 705, 709, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990).

Further, the material with an additional methyl group would be expected, by one of ordinary skill in the art, to have a greater molecular weight and a corresponding reduction in vapor pressure.

It would have been obvious at the time of the invention for one of ordinary skill in the art to have further employed any of the materials or a homolog of the successful chemicals demonstrated by Torii et al. and mixed them in compositions comprising

perfumes that are indicated to be used for successful body care products that have an inherent odor that is not unpleasant, with a reasonable expectation of success.

### **Response to Arguments**

Applicant's arguments filed 09 September 2009 have been fully considered but they are not persuasive.

In regard to argument concerning rejections of Claims 3, 5, 8,10-11, and 13, that employing a homolog would be expected to be applicable for all related material properties for the materials.

The fact that Applicants have recognized another advantage which would flow naturally from the prior art cannot be the basis for patentability when the differences would otherwise be obvious. See *Ex parte Obiaya*, 227 USPQ 58, 60 (Bd. Pat. App. & Inter. 1985). A reduction in material vapor pressure would be expected to enable a material's effect and presence by remaining longer in the application.

Further, any fragrance embodiment would be expected to be naturally detectible when employed by one of ordinary skill in any art.

Further, when a claim covers several structures or compositions, either generically or as alternatives, the claim is deemed anticipated if any of the structures or compositions within the scope of the claim is known in the prior art." *Brown v. 3M*, 265 F.3d 1349, 1351, 60 USPQ2d 1375, 1376 (Fed. Cir. 2001).

In the present case, as the claimed fragrance and fragrancing application is not indicated to require any describable olfactory note, the chemicals applicable to those embodied in the instant Claims are not taken as being required to provide any particular olfactory note when employed.

Further to arguments:

Applicants argue:

A. In regard to Karr Hunt {pages 12 to 14 of 23}:

That Karr Hunt fails to provide motivation to select fragrance materials as a fragrance ingredient.

In response:

As Claim 3 does not require any attributable odor to the fragrance or fragrance application, the inherent material properties of the materials in the genus description provided by and applied in the reference are taken as naturally applying to towards materials chosen as fragrances as the materials taught and applied are taken as applicable to those employed in the method.

As Claims 3 or 5 do not require selection of a material with any specific fragrance property, materials applied, either alone or by adding them to compositions, are taken as being added with the properties they possess; the fact that Applicants have recognized another advantage which would flow naturally from the prior art cannot be the basis for patentability.

B. In regard to Finch in view of Karr Hunt {pages 14 to 16 of 23}:

That as Finch does not disclose the materials of Claims 3, 5, 8, 10-11, 13, 15, 18-19, Karr Hunt is insufficient in application to any deficiencies in Finch.

In response, as Karr Hunt is not found deficient as discussed per section A above, Karr Hunt is taken as being applicable to addressing any deficiencies in Finch.

C. In regard to Torii in view of Kaiser {pages 16 to 18 of 23}:

That Torii and Kaiser do not teach or suggest the limitations of Claims 3 and 8.

As Torii describe materials in compositions that are to have no-unpleasant odor, and that all chemicals in the genus of Figure 2, in regard to Torii, are indicated to possess no unpleasant odors (col 3 lines 32-34), while the materials are not indicated to be odorless; and as it is known in the art, as taught by Kaiser, that fragrance chemicals are applicable to having no unpleasant odor, the combined references are taken as indicating that the materials of Torii are applicable to fragrance properties.

D. In regard to Torii {pages 18 to 19 of 23}:

That Torii does not teach or suggest the limitations of Claims 11 and 13.

In response:

All chemicals in the genus of Figure 2 above, in regard to Torii, are indicated to possess no unpleasant odors (col 3 lines 32-34), while the materials are not indicated to be odorless. This is taken as the materials are employed because the odor they have is not considered as unpleasant. As such, chemical homologs would also be considered as having an odor that is not unpleasant.



E. In regard to Karr Hunt in view of Torii and Kaiser {page 20 of 23}:

That Karr Hunt with Torii and Kaiser does not teach or suggest the limitations of Claims 8 and 15.

In response, these rejections have been withdrawn.

### **Conclusion**

All claims are drawn to the same invention claimed in the application prior to the entry of the submission under 37 CFR 1.114 and could have been finally rejected on the grounds and art of record in the next Office action if they had been entered in the application prior to entry under 37 CFR 1.114. Accordingly, **THIS ACTION IS MADE FINAL** even though it is a first action after the filing of a request for continued examination and the submission under 37 CFR 1.114. See MPEP § 706.07(b). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the

advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

### **Examiner Contact Information**

Any inquiry concerning this communication or earlier communications from the examiner should be directed to AARON GRESO whose telephone number is (571)270-7337. The examiner can normally be reached on M-F 0730-1700.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571 272 1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Milton I. Cano/  
Supervisory Patent Examiner, Art Unit 1763

/Aaron J. Greso/

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